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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court may refuse to enforce an arbitration award under a collective bargaining agreement on the ground that enforcement of the award would contravene "public policy," where the award neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action that is prohibited by law.

2. If the answer to Question 1 is "yes", what are the limits of the courts' power to refuse enforcement of arbitration awards on the basis of supposed contravention of public policy?

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UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

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v.

MISCO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Misco, Inc. v. United Paperworkers Inter. Union*, 768 F.2d 739 (5th Cir. No. 84-4727; August 19, 1985).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 768 F.2d 739, and is reprinted *infra* at App. 1a-13a. The opinion of the United States District Court for the Western District of Louisiana is unreported, and is printed *infra* at App. 16a-24a. The arbitrator's award at issue is unreported, and is printed *infra* at App. 25a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19, 1985 (App. 1a, 7a). A timely petition for rehearing was denied on June 3, 1986 (App. 14a-15a). On August 13, 1986, Justice White signed an order extending the time for filing a petition for writ of certiorari to and including October 1, 1986 (App. 54a). On September 22, 1986, Justice White signed an order further extending the time for filing a petition for writ of certiorari to and including October 20, 1986 (App. 55a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Company (respondent) and Unions (petitioners) were, at all times relevant here, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's plant in Monroe, Louisiana.[1] The agreement provided that the Company would not discharge employees without "just cause," and

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[1] Petitioner United Paperworkers International Union, AFL-CIO ("UPIU") is the exclusive bargaining representative of the employees. Petitioner Ouachita Local 654 is affiliated with UPIU. UPIU and the local both were parties to the collective bargaining agreement with the Company.

contained a typical grievance-arbitration provision entitling the Unions to take to arbitration any grievance "arising out of the interpretation or application of the terms of this Agreement." The agreement declared that an arbitrator's decision "shall be final and binding to both parties of this Agreement."

On February 7, 1983, the Company discharged Isiah Cooper, an employee covered by the agreement. The stated ground for discharge was that Cooper had "violated company rules in being in a car [in the Company's parking lot] with a lit marijuana cigarette." (App. 27a.) The rule Cooper was alleged to have violated listed, among the "causes for discharge":

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances. [App. 31a].

The precipitating cause of the discharge was that Cooper had been arrested by the police on January 21, 1983, after sitting in the *back* seat of another employee's car in Misco's parking lot. At the time of the arrest, a lit marijuana cigarette was found in the ashtray of the right *front* door of the car, two employees having vacated the front seat of the car just prior to Cooper's arrest. (App. 2a-3a, 48a-49a.)[2]

A grievance was filed protesting the discharge. The parties were unable to resolve the grievance and the Unions therefore took the matter to arbitration. Under the auspices of the Federal Mediation & Conciliation

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[2] The police were on the Company's premises because, having searched Cooper's home pursuant to a warrant and found marijuana there, they had him under surveillance. Cooper ultimately pleaded guilty to a charge of possession of marijuana in his home. Cooper was never charged criminally for either possession or use of marijuana on Company premises (App. 8a, 34a-35a, 40a, 50a-51a).

Service, the parties selected as arbitrator Milden J. Fox, Jr., a professor of industrial engineering at Texas A&M University and an experienced labor arbitrator.[3]

The arbitrator sustained the grievance, concluding that the Company had discharged Cooper without just cause, and ordered that Cooper be reinstated with backpay. The arbitrator applied the traditional labor arbitration rule that the employer has the burden of proving that a discharge was for just cause. Here, the sole evidence presented by the Company to support the ground for discharge was that Cooper had been sitting in the back seat of a car and a lit marijuana cigarette was found in an ashtray in the front seat where two other employees had been sitting. That evidence, the arbitrator concluded, was insufficient to establish that Cooper either possessed or had smoked a marijuana cigarette on plant premises, and thus insufficient to establish that Cooper had violated the Company's rule. (App. 42a, 50a-51a.)

At the arbitration hearing, the Company had offered evidence of a separate event of which it had not been aware at the time Cooper was discharged, but which the Company discovered eight months later on the eve of the arbitration hearing: that on the day of Cooper's arrest, the police had also searched Cooper's *own* car (a different car from that in which he was sitting prior to arrest) and had found a plastic bag containing marijuana "gleanings" in a microscopic quantity too small to be usable (App. 3a, 8a, 22a, 46a). The arbitrator refused to consider this evidence in determining whether the discharge was for just cause, for two reasons: (1) "just cause" requires that an employer have had grounds justifying discharge when the discharge action was taken, and an employer cannot defend a discharge on grounds that were unknown to it at the time of discharge and that thus constitute post-hoc rational-

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[3] See BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984), pp. 857-58.

izations; and (2) to entertain justifications for discharge at the arbitration stage that were never proffered in the steps of the grievance procedure would undermine the role of the grievance procedure as the primary forum for the resolution of grievances (App. 43a, 45a-47a, 49a).

The Company refused to comply with the arbitration award, but, instead, instituted this lawsuit against the Unions, under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an order vacating the arbitration award. In its complaint, the Company alleged, *inter alia*, that the award contravened public policy.

The parties filed cross motions for summary judgment, and the district court granted the Company's motion and vacated the arbitration award. The district court declared that "an award that is contrary to law or public policy need not be enforced" (App. 20a). In the district court's view the presence of marijuana gleanings in Cooper's car meant that the award reinstating Cooper offended two public policies: the policy against marijuana possession, and the policy against operation of dangerous machines by workers under drug influence (App. 22a). "For this reason," the court concluded that the Company was entitled to an order setting aside the arbitrator's award. (*Id.*).

A divided court of appeals affirmed. The majority (Judge Gee, joined by Judge Higginbotham), although broadly hinting that the evidence before the arbitrator justified a finding that Cooper had smoked a marijuana cigarette, stopped short of overturning the arbitrator's contrary finding of fact (App. 2a-3a). It was enough to invalidate the award, said the majority below, that the arbitrator knew that there were marijuana gleanings—albeit in a quantity too small to be usable—in Cooper's car, for this meant that the reinstatement of Cooper would contravene public policy:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for

> Cooper in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot.
>
> . . . [H]is narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is . . . one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy. [App. 7a; emphasis in opinion].

Judge Tate, dissenting, reasoned as follows:

> [E]ven though possession of marijuana violates *a* public policy, *see* La. Rev. Stat. Ann. 40:966(D), we cannot say that reinstatement of an employee in whose car were found non-employment-related traces of marijuana would violate any "well defined and dominant" public policy against using or being under the influence of marijuana *while at work.* [App. 13a; emphasis in opinion.]

REASONS FOR GRANTING THE WRIT

In *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), this Court recognized an exception to the general principle that arbitration awards under collective bargaining agreements are to be enforced so long as they draw their essence from the agreement: "If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it," *id.* at 766.

In the wake of *Grace*, the Courts of Appeals have issued decisions that are in irreconcilable conflict as to

the scope and meaning of this "public policy" exception. The District of Columbia and Ninth Circuits have held that the exception applies only when the arbitration award gives a construction to the agreement that renders the agreement unlawful, or directs a party to take an action that would be unlawful. *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986); *Bevles Co. Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986). The First and Seventh Circuits, as well as the Fifth Circuit in the instant case, have expressly rejected that view, concluding that the exception is broader and entitles courts to vacate arbitration awards in some circumstances even though the agreement as construed by the award is wholly lawful and the action directed by the award is wholly lawful. *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984); *E.I. DuPont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986) *cert. denied*, —— U.S. ——, 55 LW 3235 (Oct. 6, 1986); *Misco, Inc. v. United Paperworkers Intern. Union*, 768 F.2d 739 (5th Cir. 1985). Under the principles announced by the District of Columbia and Ninth Circuits, the arbitration award in the instant case would *not* have been vacated.

This circuit conflict poses a most serious threat to the important national labor policy favoring "[f]inal adjustment [of disputes arising under collective bargaining agreements] by a method agreed upon by the parties. . . ." Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d). That policy has "served the industrial relations community well" and has "led to continued reliance on arbitration" to settle such disputes. *AT&T Technologies, Inc. v. Communication Workers*, —— U.S. ——, 106 S. Ct. 1415, 1418 (1986). In originally announcing the narrow scope of review for labor arbitration awards, this Court observed that "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would

almost never be final." *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960). The present conflict in the circuits as to the scope of the "public policy" exception has precipitated a comparable unravelling of the federal interest in arbitral finality.

A. The standard that ordinarily controls the review of labor arbitration awards has been settled for more than a quarter-century. As recounted in *Grace*, 461 U.S. at 764:

> Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," *id.* at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *Id.*, at 598.

While reaffirming this standard in *Grace*, the Court marked out, in the following terms, the "public policy" exception whose applicability is the issue in the instant case:

> As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. See *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). . . . [T]he question of public policy is ultimately one for resolution by the courts. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd v. Hodge*, 334 U.S., at 35. Such a public policy, however, must be well defined and dominant, and is to be ascer-

> tained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. United States*, 324 U.S. 49, 66 (1945). [461 U.S. at 766.] [4]

In *Grace*, the employer alleged that the arbitration award directed it to take action that was contrary to an outstanding court injunction. The Court in *Grace* made it plain that an award would be unenforceable because in contravention of public policy if the award ordered the employer to take an action forbidden by an outstanding court injunction (*id.* at 766-67). But because the Court concluded that that circumstance in fact was *not* present in *Grace*, the award there was enforced (*id.* at 768-70).[5]

B. In the instant case, the Court of Appeals did not rule that the arbitrator's award failed to "draw its essence" from the collective bargaining agreement. Nor did that court suggest that compliance with the award would require the Company to violate any law, regulation, injunction or other legal command. Nonetheless, the court below overturned the award as offensive to "public policy", because the award directed the employer to reinstate an operator of dangerous machinery who possessed a small, unusable quantity of marijuana in his car in the employer's parking lot and, in the view of the majority below, thereby conflicted with the public interest in plant safety.

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[4] In *Muschany* the Court continued as follows:

> As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy. It is a matter of public importance that good faith contracts . . . should not be lightly invalidated. Only dominant public policy would justify such action. [324 U.S. at 66.]

[5] The Court in *Grace* also rejected the employer's argument that public policy would be contravened by holding it to a contractual promise inconsistent with a later promise made to the EEOC in a conciliation agreement (*id.* at 770-72).

Two other appellate courts have likewise understood the "public policy" exception established by *Grace* to authorize the vacation of arbitration awards although the action directed by the award would be lawful. In *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), the First Circuit refused, on publicy policy grounds, to enforce an arbitration award directing the reinstatement of an employee who had been discharged following an embezzlement conviction. The First Circuit did not dispute the union's contention that the employer could lawfully reinstate the employee; instead, that court rejected the legal conclusion that the union contended made that fact dispositive, *viz*, that an arbitration award is contrary to public policy only if compliance with the award would violate "a direct legal prohibition," *id.* at 824. Similarly, in *E.I. DuPont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 55 LW 3235 (Oct. 6, 1986), although enforcing an arbitration award reinstating an employee who had gone beserk and committed criminal offenses, the Seventh Circuit expressly rejected the proposition that "so long as the reinstatement of [an] employee does not violate any rule of positive law, the award cannot be overturned on the ground of public policy," *id.* at 616. The *DuPont* decision relied upon the decision below in the instant case to support its conclusion in this regard.

The foregoing First, Fifth and Seventh Circuit decisions are in direct conflict with decisions of two other courts of appeals. In *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the District of Columbia Circuit upheld an award that ordered reinstatement of a postal employee who had admitted converting postal funds to his own use. Rejecting the Postal Service's contention that public policy would be contravened by requiring it to employ an admitted converter of postal funds, the court stated its understanding of the limit of the public policy exception recognized in *Grace* to be

> that courts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action. [*Id.* at 8.]

As thus understood, *Grace* did not support the Postal Service's public policy contention:

> There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct. [*Id.*]

And the District of Columbia Circuit took direct issue with the First Circuit's decision in *Postal Service v. Postal Workers Union*, *supra*, stating: "Frankly, we find it difficult to square either the rationale or the result in the [First Circuit] case with the Supreme Court decision in *W.R. Grace*. . . ." (789 F.2d at 9.)[6]

The same understanding of *Grace* was adopted by the Ninth Circuit, which prior to *Grace* had posited incon-

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[6] The District of Columbia Circuit applied the same standard in *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986). There, an arbitrator had construed an agreement subjecting the exercise of management rights to "applicable laws and regulations" as requiring the Postal Service to pay a postal employee, in accordance with a Tennessee statute, for service on a local court jury. The Postal Service contended that the award "is contrary to a well-defined public policy of federal supremacy or preemption, under which the Postal Service's operations are not to be subjected to a patchwork of conflicting state laws," *id.* at 20. In rejecting that contention, the District of Columbia Circuit reiterated the holding in its prior decision and reasoned as follows:

> [T]he Postal Service concedes that the public policy of federal supremacy does not preclude it from *agreeing* to subject itself to the Tennessee law. . . . Because the contract has been interpreted by the arbitrator to include an *agreement* by the Postal Service to comply with this particular statute as "applicable law," any public policy against *compelling* the Postal Service to obey such laws is inapposite. [*Id.* at 21; emphasis in court's opinion.]

sistency with law as the limit of the "public policy" exception, *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981), and which adhered to that position, after *Grace*, in *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *pet. for cert. pending*, No. 86-431. In *Bevles*, the court enforced an arbitration award requiring the employer to reinstate two employees who had been discharged when they were discovered to be undocumented aliens. The employer's contention that public policy would be contravened by compelling the employment of undocumented aliens was rejected because, while such individuals have no right to be in this country, federal law does not forbid the employment of undocumented aliens (*id.* at 1391-92), and, while a California statute purports to do so, that statute is in "limbo," its enforcement having been enjoined by state courts pending a final determination of its constitutionality (*id.* at 1392-94).[7]

Two other Courts of Appeals, in decisions since *Grace*, have upheld arbitration awards as not violating public policy in circumstances similar to the instant case, albeit without fully articulating their view of the scope of the

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[7] The pending petition for certiorari in *Bevles* does not seek a resolution of the circuit conflict discussed in the instant petition but rather challenges the correctness of the Ninth Circuit's understanding of the federal and state laws respecting undocumented aliens. Similarly, the pending petition for certiorari in *Keystone Consolidated Industries, Inc. v. International Union, United Automobile Workers*, No. 86-406—seeking review of a Seventh Circuit decision enforcing an award requiring an employer to contribute to a pension fund despite the employer's having secured a contribution waiver under ERISA, *Local 449, UAW v. Keystone Consolidated Industries, Inc.*, 793 F.2d 810 (7th Cir. 1986)—does not seek resolution of the circuit conflict discussed in the instant petition, but rather seeks review of the Seventh Circuit's determination that there is no conflict between the arbitration award in that case and ERISA. We believe the instant petition to be the only one now before the Court seeking a resolution of the circuit conflict over the scope of the public policy exception announced in *Grace*.

"public policy" exception. *Premium Bldg. Products Co. v. United Steelworkers*, 616 F. Supp. 512 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) (reinstatement of employee discharged for smoking marijuana at his workplace); *Super Tire Eng. v. Teamsters Local Union No. 676*, 721 F.2d 121, 125 n.6 (3rd Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 83 (1984) (reinstatement of employee discharged for repeatedly consuming liquor during working hours).[8]

C. In *E.I. DuPont, supra*, Judge Easterbrook, in a concurring opinion that agreed with the result but not the reasoning of the majority, provided the most extensive demonstration that the understanding of the "public policy" exception adopted by the District of Columbia and Ninth Circuits is sound in principle and accords with *Grace* whereas the contrary view adopted by the First, Fifth and Seventh Circuits is unsound and inconsistent

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[8] See also, *S. D. Warren Co. v. United Paperworkers Intern.*, 632 F. Supp. 463 (D.Me. 1986) (enforcing award reinstating employee discharged for possession of marijuana on employer's premises; court expressly disagrees with decision of Fifth Circuit in the instant case); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303 (D. Minn. 1986) (enforcing award reinstating airline maintenance supervisor discharged for being accomplice to cocaine smuggling); *Peabody Coal Co. v. United Mine Workers*, 120 LRRM 2270 (S.D. Ohio 1985) (enforcing award reinstating employee discharged for stealing employer's porperty); *Wyman-Gordon Co. v. United Steelworkers of America*, 613 F. Supp. 626 (N.D. Ill. 1985) (enforcing award reinstating employee discharged for fraudulently collecting unemployment benefits while working for the employer).

And see, the following appellate decisions pre-dating *Grace* in which arbitration awards were upheld despite "public policy" contentions: *Local 453, Internat'l U. of E., R. & M. W. v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963) (Marshall, J.), *cert. denied*, 373 U.S. 949 (1963) (reinstatement of employee convicted of running gambling operation on employer's premises); *International Ass'n of Mach., Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969) (*same*); *Kane Gas Light and Heating v. Intern. Broth., etc.*, 687 F.2d 673 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) (reinstatement of utility employee who closed main valve and thereby cut off gas service to entire borough).

with *Grace*. Because we cannot improve on Judge Easterbrook's analysis, we quote it at some length:

> "Public policy" is an ambiguous term. A court that sets aside an arbitrator's award could mean: "Whether or not the award carries out the contract, there is a rule against this outcome." An arbitrator's reinstatement of white employees in preference to identically-situated black employees would violate public policy in this sense. . . .
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> * * *
>
> Public policy is used in [another] way when a court claims the right . . . to decide whether an award cuts at cross purposes with a policy the court thinks valuable. If an arbitrator reinstates an employee caught using drugs, the court may say that this undermines the public policy of deterring the use of drugs, so the award cannot stand. [Citing the decision below in the instant case]. . . .
>
> The court today approves this [latter] inquiry in principle, although it disagrees with the district court's implementation of the principle. I find the principle itself objectionable. A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. [790 F.2d at 617-18.]

Judge Easterbrook went on to observe that if an employer decided on its own to retain an employee who had committed offenses of the type involved in *DuPont* (or the type involved here), "no public policy would stand in the way," and the same would be true if an employer agreed in express terms with a union to retain such an employee. *Id.* at 619. And the "public policy inquiry should be the same whether the arbitrator is applying an express clause of the contract or applying a general one (such as 'just cause') that he has made concrete." *Id.*

Judge Easterbrook offered one further reason for objecting to the "loose use of 'public policy' to set aside an [arbitration] award": such a use "conflicts with a *real* public policy, one expressed in positive law"—the policy favoring enforcement of arbitration awards that faithfully implement the parties' intent (790 F.2d at 618 (emphasis in original)). Judge Easterbrook elaborated:

> [E]nforcement of the award turn[s] on the meaning of the contract, not on equitable notions about public policy. If the contract violates a rule of law, then the contract itself must be set aside. . . . But if the contract is lawful, and the arbitrator follows or interprets the contract within his authority, the court "must grant . . . an order" enforcing the award. [790 F.2d at 618] [9]

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[9] Of course, under the view of the "public policy" exception championed by Judge Easterbrook a public policy pertinent to employment *is* manifested by a law forbidding the employment of certain persons in certain occupations. Some such statutes do exist, and an arbitration award directing reinstatement that would contravene such a law would be unenforceable under this theory because such an award would command conduct forbidden by law. See, *e.g.*, *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (vacating award that ordered reinstatement of employee whose employment was barred by federal statute); *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983) (vacating award that ordered reinstatement of employee whose employment was apparently barred by federal regulations).

The court below reasoned that the "public policy" being enforced here is likewise rooted in positive law: the Louisiana criminal law forbidding possession of marijuana (App. 7a). But as other courts have recognized, the public policy expressed in the criminal laws is vindicated through enforcement of those laws, and does not dictate the non-employment of criminal offenders. *Local 453, Internat'l U. of E., R. & M. W. v. Otis Elevator Co.*, 314 F.2d 25, 28-29 (2d Cir. 1963) (Marshall, J.); *International Ass'n of Mach., Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir. 1969). If the state has not forbidden the continued employment of such criminal offenders, there is no employment-related "public policy" required by the rulings of the District of Columbia and Ninth Circuits and championed by Judge Easterbrook.

D. The existence of a conflict among the circuits on a recurring issue under § 301 is, of course, reason enough to warrant plenary review by this Court. But the need for prompt review is magnified by the deleterious effect on the national labor policy that results from the existing conflict.

Under the legal standard adopted by the First, Fifth and Seventh Circuits, arbitration awards may be set aside even though the action commanded by the awards is lawful. Whether a given award *will* be set aside depends upon the courts' evaluation of "public policy" criteria which, because not grounded in positive law, cannot be predicted by the parties with any degree of accuracy. In these circumstances, there is strong temptation for the losing party in arbitration to resist acceptance of the award and to shop for a favorable judicial decision based on "public policy." In the area of discharges alone, cases involving, *e.g.* marijuana possession, liquor consumption, gambling, and illegal alien status have become prime vehicles for appeals to "public policy" in resistance to awards directing reinstatement. And, of course, the problem is not confined to awards in discharge cases, as the decisions in *National Ass'n of Letter Carriers* (*supra*, p. 11, n.6), *Keystone* (*supra*, p. 12, n.7) and *Grace* itself reflect. The substantial volume of decided cases in the past three years is but the tip of the iceberg, for like cases are now pending throughout the country in great number.

One Court of Appeals has expressed "[c]oncern . . . that some companies nowadays are trying to reduce the credibility of unions by dragging out the grievance process through challenges in court to arbitration awards." *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 188 (7th Cir. 1985) (Posner, J.); *see also Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1168 (7th Cir. 1984); *cf. Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 16 (7th Cir. 1985). Regardless of the disposition of any particular "public

policy" challenge to an arbitration award, it is indisputable that the national labor policy is damaged by lack of finality and the delay that attends the *efforts* to secure judicial overturning of such awards. And where the effort succeeds, there is both a direct injury to the arbitral process in that case and an example that will encourage the filing of more such cases in court. Indeed, the extent to which the court below has gone in the instant case (refusing to enforce an award of reinstatement because the employee had nonusable traces of marijuana in his car) inevitably serves as a signal that a broad degree of judicial creativity is available to those who resist compliance with arbitration awards. That invitation wll not go unheeded.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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